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Proposed Attorneys for the Debtors and
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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In re: : Chapter 11
: :
Greenbrier Hotel Corporation, et al., : Case No. 09-_____ (____)
: :
Debtors. : (Joint Administration Pending)
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**MOTION OF THE DEBTORS FOR ORDER PURSUANT TO BANKRUPTCY CODE
SECTIONS 105(A), 506(A), 507(A)(8), 541, AND 1129 AND BANKRUPTCY
RULE 6003 AUTHORIZING THE DEBTORS TO PAY PREPETITION
SALES, USE, HOTEL OCCUPANCY AND OTHER TRUST FUND TAXES
AND RELATED OBLIGATIONS**

The debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**”),¹ hereby move (the “**Motion**”) this Court for entry of an order, pursuant to sections 105(a), 506(a), 507(a)(8), 541, and 1129 of Title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) authorizing, but not directing, the Debtors to pay prepetition sales, use,

¹ The last four digits of the Debtors’ taxpayer identification numbers are: (i) Greenbrier Hotel Corporation (2133); (ii) The Greenbrier Resort and Club Management Company (8589); (iii) Greenbrier IA, Inc. (6471); (iv) The Old White Development Company (3021); (v) Old White Club Corporation (0031); and (vi) Greenbrier Golf and Tennis Club Corporation (0033). Each of the Debtors has a mailing address of 300 W. Main Street, White Sulphur Springs, WV 24986-2075.

hotel occupancy, and other “trust fund” taxes and certain related obligations. In support of the Motion, the Debtors rely upon and incorporate by reference the Affidavit of Michael McGovern, Chief Financial Officer of Greenbrier Hotel Corporation, in Support of Chapter 11 Petitions and First Day Pleadings (the “**McGovern Affidavit**”), filed with the Court concurrently herewith. In further support of the Motion, the Debtors respectfully represent:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are sections 105(a), 506(a), 507(a)(8), 541, and 1129 of the Bankruptcy Code. Such relief is warranted pursuant to Bankruptcy Rule 6003.

BACKGROUND

3. On the date hereof (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. The factual background regarding the Debtors, including their business operations, their capital and debt structure, and the events leading to the filing of these bankruptcy cases, is set forth in detail in the McGovern Affidavit, filed concurrently herewith and fully incorporated herein by reference.²

4. The Debtors continue to operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. No trustee or examiner has been appointed in these chapter 11 cases, and no committees have yet been appointed or designated.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the McGovern Affidavit.

RELIEF REQUESTED

6. By this Motion, the Debtors request entry of an order, pursuant to sections 105(a), 506(a), 507(a)(8), 541, and 1129, authorizing, but not directing, them to pay prepetition sales, use, hotel occupancy, and other similar “trust fund” taxes and related obligations (collectively, the “**Taxes**”), to the respective taxing or other appropriate authorities (the “**Taxing Authorities**”) in an amount up to \$53,000, in the ordinary course of the Debtors’ business. Such relief will be without prejudice to the Debtors’ rights to contest the amounts of any Taxes on any grounds they deem appropriate.

BASIS FOR RELIEF

7. The Debtors collect from guests, customers, and others an assortment of state and local Taxes, including, among others, sales, use, wine and liquor excise, and hotel occupancy taxes. Furthermore, the Debtors incur use taxes for purchases of materials and supplies in the ordinary course of business from out-of-state vendors. The Debtors remit actual amounts due to the Taxing Authorities monthly, generally in the month after collecting the applicable Tax. While the amounts of Tax remittances vary directly with the level of the Debtors’ businesses, the Debtors estimate that they remit to the Taxing Authorities approximately \$72,000 monthly in the aggregate for sales, use, liquor and wine, and occupancy Taxes.

8. As of the Petition Date, the Debtors estimate that they owe the Taxing Authorities less than \$53,000 in sales, use, liquor and wine, and occupancy Taxes on account of prepetition activities. The Debtors believe that the next payments for such sales, use, liquor and wine, and occupancy Taxes will be due on April 20, 2009 for the month of March 2009.

9. Certain Taxing Authorities either have not been paid or have been sent checks and/or wires for Taxes that may or may not have been presented or cleared as of the Petition

Date. Accordingly, the Debtors seek entry of an order directing their banks to honor prepetition checks and wires issued by the Debtors to the Taxing Authorities in payment of prepetition Taxes that, as of the Petition Date, have not cleared or been transferred. In addition, to the extent the Debtors have not yet sought to remit payment to the Taxing Authorities with respect to certain Taxes, the Debtors seek entry of an order authorizing, but not directing them, to issue checks or provide for other means of payment to the Taxing Authorities as necessary to pay the Taxes.

APPLICABLE AUTHORITY

A. Payment of the Taxes is Authorized Under Section 541 of the Bankruptcy Code.

10. The Debtors believe that many of the Taxes constitute trust fund taxes that are required to be collected from third parties and held in trust for payment to the Taxing Authorities. See, e.g., DeChiaro v. N.Y. State Tax Comm'n, 760 F.2d 432, 433-34 (2nd Cir. 1985) (sales tax required by state law to be collected by sellers from their customers is a “trust fund” tax); Shank v. Wash. State Dep’t of Revenue (In re Shank), 792 F.2d 829, 830 (9th Cir. 1986) (same); Rosenow v. Ill. Dep’t of Revenue (In re Rosenow), 715 F.2d 277, 282 (7th Cir. 1983) (same).

11. Section 541(d) of the Bankruptcy Code provides that if a debtor holds only legal title to property then such property only becomes property of the estate to the extent of the debtor’s legal title, but not to the extent of any equitable interest in the property.

12. Because the Taxes constitute “trust fund” Taxes, the funds that would be used to pay the Taxes are not property of the Debtors’ estates within the meaning of section 541 of the Bankruptcy Code. See Beiger v. IRS, 496 U.S. 53, 55-67 (1990) (holding that a prepetition payment of trust fund taxes is not subject to avoidance because such are not the debtor’s

property); DuCharmes & Co., Inc. v. Mich. (In re DuCharmes & Co.), 852 F.2d 194 (6th Cir. 1988) (per curiam) (same). Any trust fund Taxes that have been collected are not property of the Debtors' estates under section 541(d). See, e.g., In re Dameron, 155 F.3d 718, 721-22 (4th Cir. 1998) (funds held by debtor as closing agent for the benefit of third parties were not property of the debtor's estate).

13. Accordingly, the Court should authorize immediate payment of the Taxes to the Taxing Authorities pursuant to section 541 of the Bankruptcy Code.

B. Payment of the Taxes is Appropriate Under Sections 506, 507(a)(8), and 1129 of the Bankruptcy Code.

14. Even if the funds held by the Debtors for the payment of the Taxes were not held in trust, payment of the Taxes would nonetheless be proper under sections 506, 507(a)(8), and 1129 of the Bankruptcy Code. Specifically, the Taxes are mostly, if not entirely, either priority claims pursuant to section 507(a)(8) of the Bankruptcy Code, or secured claims pursuant to section 506(a) of the Bankruptcy Code. Accordingly, their payment should be authorized on the basis that they are required to be paid in full in any event as a condition to satisfying the plan confirmation requirements contained in section 1129 of the Bankruptcy Code.³

15. In particular, if the Taxes are priority claims, section 1129(a)(9)(c) requires that they be paid no less favorably than through regular installment payments, over a period not exceeding five years after the Petition Date, of a total value as of the effective date of the plan equal to the allowed amount of each such claim. See 11 U.S.C. § 1129(a)(9)(c). On the other hand, if the Taxes are secured claims, section 1129(b)(2)(A) requires that they be satisfied through deferred cash payments totaling at least the allowed amount of each such claim, of a value as of the effective date of the plan equal to the value of the collateral securing the claim,

³ The Debtors believe that a significant portion of the Taxes are priority or secured claims, and the remainder is *de minimis* in light of the circumstances of these cases.

with a continuation of the liens against the collateral; or, if the collateral is to be sold, that the lien securing the claim attach to the proceeds of sale; or that the holder realize the indubitable equivalent of the claim. See 11 U.S.C. § 1129(b)(2)(A).

16. Therefore, the Debtors' payment of the Taxes now only affects the timing of the payments and not the amounts to be received by the Taxing Authorities. In that regard, by paying the Taxes now, the Debtors avoid any unnecessary fees, interest, or penalties that might otherwise accrue. At the same time, other creditors and parties in interest will be benefited, not harmed, if the relief sought herein is granted by this Court.

C. The Tax Payments Are Also Appropriate Under Bankruptcy Code Section 105 and the Doctrine of Necessity

17. The proposed Tax payments should be authorized pursuant to section 105 of the Bankruptcy Code and under the "doctrine of necessity."

18. Section 105 of the Bankruptcy Code provides the authority for this Court "to issue any order . . . necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105. For the reasons set forth herein, and in light of the critical need for the Debtors to preserve the going concern value of their businesses in order to successfully conclude these bankruptcy cases through, among other things, avoiding the cost and expense of audits or litigation regarding the Taxes, payment of the Taxes as requested herein is proper in accordance with section 105 of the Bankruptcy Code.

19. Payment of the Taxes is further supported by the doctrine of necessity. The doctrine of necessity is a well-settled doctrine that originated in railway cases and was later expanded. See Miltenberger v. Logansport, C.&S.W.R. Co., 106 U.S. 286 (1882); Dudley v. Mealey, 147 F.2d 268, 271 (2nd Cir. 1945) (applying the rule to supply creditors where alternative was cessation of operations in a hotel bankruptcy case).

20. The doctrine of necessity permits a bankruptcy court to authorize payment of certain prepetition claims prior to the completion of the reorganization process where the payment of such claims is necessary to the reorganization. See In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor [.]” and must show a “substantial necessity.”); see also In re Just for Feet, Inc., 242 B.R. 821, 824-45 (Bankr. D. Del. 1999) (noting that, in the Third Circuit, where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to pay such claims that are essential to the continued operation of the business).

21. The doctrine of necessity is a widely accepted component of modern bankruptcy jurisprudence. See In re NVR L.P., 147 B.R. at 127 (“[T]he ‘necessity of payment’ rule is a narrow exception well-established in bankruptcy common law.”); see also Just for Feet, 242 B.R. at 826 (approving payment of key inventory suppliers’ prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new inventory on eve of debtor’s key sales season); In re Eagle-Picher Indus., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of prepetition unsecured claims of tool makers as necessary to the chapter 11 process).

22. For the reasons discussed herein, it is evident that payment of Taxes is necessary to the Debtors’ ability to successfully conclude these bankruptcy cases and to preserve the value of the Debtors’ estates. Absent such relief, the Debtors may bear the cost and expense of audits or litigation regarding the Taxes, as well as penalties and interest costs.

D. Payment of the Taxes is Necessary to Avoid Immediate and Irreparable Harm Under Bankruptcy Rule 6003.

23. Similarly, the relief requested is warranted under Bankruptcy Rule 6003, which provides:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding the following: . . . (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001.

Fed. R. Bankr. P. 6003.

24. No court within the Fourth Circuit has interpreted the “immediate and irreparable harm” language in the context of Bankruptcy Rule 6003 in any reported decision.⁴ However, the U.S. Court of Appeals for the Fourth Circuit has interpreted the same language in the context of preliminary injunctions. In that context, irreparable harm has been interpreted as a continuing harm that cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. See, e.g., Hughes Network Systems, Inc. v. Interdigital Communications Corp., 17 F.3d 691, 694 (4th Cir. 1994). Further, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. See, e.g., Scotts Co. v. United Industries Corp., 315 F.3d 264, 283 (4th Cir. 2002).

25. To the extent that the requirements of Bankruptcy Rule 6003 are applicable to the relief requested in the Motion, the Debtors submit that for the reasons already set forth herein, the relief requested in this Motion is necessary to avoid immediate and irreparable harm as defined by the U.S. Court of Appeals for the Fourth Circuit.

⁴ Although there is not direct authority concerning Bankruptcy Rule 6003 in the Fourth Circuit, at least one bankruptcy court, applying Bankruptcy Rule 6003, concluded that first-day relief in a similar context was warranted because such relief was necessary to avoid irreparable harm. See In re First NLC Fin.Serv., LLC, 382 B.R. 547, 549-50 (Bankr. S.D. Fla. 2008) (holding that Rule 6003 permits entry of retention orders on an interim basis to avoid irreparable harm).

26. Accordingly, the Court should allow the payment of the Taxes as requested herein.

27. The relief requested in this Motion has been granted in comparable chapter 11 cases in this district and in other jurisdictions. See, e.g., In re S & K Famous Brands, Inc., Case No. 09-30805 (KRH) (Bankr. E.D. Va. Feb. 29, 2009); In re Chesapeake Corporation, Case No. 08-36642 (DOT) (Bankr. E.D. Va. Dec. 29, 2008); In re Circuit City Stores, Inc., Case No. 08-35653 (KRH) (Bankr. E.D. Va. Nov. 10, 2008); In re Movie Gallery, Inc., Case No. 07-33849 (DOT) (Bankr. E.D. Va. Oct. 18, 2007); see also In re Tropicana Entertainment, LLC, Case No. 08-10856 (KJC) (Bankr. D. Del. May 5, 2008).

28. Nothing in this Motion shall be construed as impairing the Debtors' rights to contest the amount, classification, or allowability of any Taxes asserted in these cases.

NOTICE

29. Notice of this Motion will be given to: (i) the office of the United States Trustee for the Eastern District of Virginia; (ii) counsel to CSX Corporation; (iii) the United States Attorney for the Eastern District of Virginia; (iv) the Internal Revenue Service; (v) the Debtors' top twenty (20) largest unsecured creditors on a consolidated basis; (vi) the financial institutions at which the Debtors maintain bank accounts; and (vii) the Taxing Authorities. The Debtors submit that, under the circumstances, no other or further notice of the Motion is required.

WAIVER OF MEMORANDUM OF LAW

30. Pursuant to Local Bankruptcy Rule 9013-1(G), and because there are no novel issues of law presented in the Motion and all applicable authority is set forth in the Motion, the Debtors request that the requirement that all motions be accompanied by a separate memorandum of law be waived.

NO PRIOR REQUEST

31. No previous request for the relief sought herein has been made to this Court or any other court.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form annexed hereto as Exhibit A, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: Richmond, Virginia
March 19, 2009

/s/ Patrick L. Hayden
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Proposed Attorneys for Debtors and
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EXHIBIT A

(Proposed Order)

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Proposed Attorneys for the Debtors and
Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

-----X		
In re:	:	Chapter 11
	:	
Greenbrier Hotel Corporation, <u>et al.</u> ,	:	Case No. 09-_____ (___)
	:	
Debtors.	:	(Joint Administration Pending)
-----X		

**ORDER PURSUANT TO BANKRUPTCY CODE SECTIONS
105(A), 506(A), 507(A)(8), 541, AND 1129 AND BANKRUPTCY
RULE 6003 AUTHORIZING THE DEBTORS TO PAY PREPETITION
SALES, USE, AND HOTEL OCCUPANCY TRUST FUND AND OTHER TAXES
AND RELATED OBLIGATIONS**

Upon the motion (the "**Motion**")¹ of the Debtors for an order, pursuant to Bankruptcy Code sections 105(a), 506(a), 507(a)(8), 541, and 1129 and Bankruptcy Rule 6003 authorizing, but not directing, the Debtors to pay the Taxes to the appropriate Taxing Authorities; and the Court having reviewed the Motion and the McGovern Affidavit; and the Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion.

record herein; and after due deliberation thereon; and good and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. The Motion is **GRANTED**.
2. The Debtors are hereby authorized to pay all Taxes to the Taxing Authorities, including prepetition Taxes in an amount up to \$53,000, in the ordinary course of their businesses.
3. All applicable banks and other financial institutions are hereby authorized and directed to receive, process, honor, and pay any and all checks evidencing amounts paid by the Debtors pursuant to the Motion, whether presented prior to or after the Petition Date.
4. To the extent the Debtors have not yet sought to remit payment to the Taxing Authorities, the Debtors are authorized, but not directed, to issue checks or provide for other means of payment to the Taxing Authorities to the extent necessary to pay Taxes.
5. This Order is without prejudice to the Debtors' rights to contest the amounts of any Taxes on any grounds that they deem appropriate.
6. Nothing in this Order or the Motion shall be deemed to constitute postpetition assumption or adoption of any agreement under section 365 of the Bankruptcy Code.
7. The Court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and that the relief requested is necessary to avoid immediate and irreparable harm.
8. Notwithstanding Bankruptcy Rule 6004(g), this Order shall be effective and enforceable immediately upon entry hereof.
9. The requirement under Local Bankruptcy Rule 9013-1(G) to file a memorandum of law in connection with the Motion is hereby waived.

Dated: Richmond, Virginia
March __, 2009

UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

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Proposed Attorneys for the Debtors and
Debtors in Possession

CERTIFICATION OF ENDORSEMENT UNDER LOCAL RULE 9022-1(C)

I hereby certify that the foregoing proposed order has been endorsed by all necessary parties.

/s/ Patrick L. Hayden
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